SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 317

MARY A. HUFFMAN,

Petitioner,

vs.

THE CITY OF WICHITA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

JOHN W. ADAMS,
THOMAS E. ELCOCK,
Counsel for Petitioner.

H. C. CASTOR,
JOHN BOYER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 317

MARY A. HUFFMAN,
Petitioner and Appellant Below,

vs.

THE CITY OF WICHITA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Mary A. Huffman, respectfully shows to this Honorable Court.

A.

Summary Statement of the Matters Involved.

Petitioner, Mary A. Huffman, as surety, executed an $11,000.00 supersedeas bond on appeal to this Court in the case of *The Home Cab Company* v. *The City of Wichita, et al.,* 151 Kans. 697; 42 P. (2) 972; 295 U. S. 716; 55 Sup. Ct. 658; 79 L. Ed. 1672.

In that case the Home Cab Company brought an action against the City of Wichita and certain of its officials to restrain the enforcement of ordinances providing specified fees per cab for the operation of taxicabs. The injunction was denied by the District Court of Sedgwick County, Kansas, the court of first instance, and its judgment was affirmed on appeal by the Supreme Court of Kansas, the highest court of the State. The Cab Company procured the allowance of an appeal to this Court, which was by this Court dismissed (1) for the want of a properly presented Federal question and (2) for the want of a substantial Federal question.

Pending such appeal, appellee therein, The City of Wichita, filed a motion in the Supreme Court of Kansas (R. 101) reciting that such court had entered its order withholding the sending of the mandate to the District Court pending an appeal to this Court; that no time had been fixed for filing a bond; that the amount of bond should be fixed and time given to file it; that appellant Cab Company was operating cabs and had already become liable for $4,025.00 for license fees for the year 1934; for which amount no adequate bond had been required; that the Cab Company, in appellee's opinion, was not financially responsible for such amount; that the license year for 1934 would end December 31, 1934; that it was to be assumed that the appeal would not be disposed of by this Court until 1935; that approximately the same amount of license fee would be due for such year, and that in addition to such license fees it had been compelled to employ special counsel whose fees would not be less than $2,000.00. The motion concluded as follows (R. 103):

> "That the bond in this case should be fixed at not more than Eleven Thousand Dollars ($11,000.00), conditioned that the appellant, The Home Cab Company, will be liable and will pay to The City of Wichita, one of the

appellees, all damages and costs which The City of Wichita will suffer by reason of the failure to pay licenses fees for the years 1934 and 1935, and for all other damages and costs, including counsel fees incurred in this appeal if taken.

"WHEREFORE, these appellees, pray that an order enter, requiring the appellant, The Home Cab Company, to post a supersedeas bond covering the damages herein enumerated and costs, for not less than Eleven Thousand Dollars ($11,000.00), and that such order provide that such bond shall be filed not later than the 28th day of December, 1934, said bond to be approved by this court."

The Cab Company replied to this motion (R. 103) stating that it had no objection to the Court fixing a reasonable amount for the supersedeas bond and giving a reasonable time in which to furnish said bond, denied that it was operating so many cabs as the City claimed; stated that the amount of license fees that might be due from it for the balance of the year 1934 was $1,920.00; that a like amount would fully protect the City for the year 1935; that the City Commission of the City was about to amend the license fee provision by reducing it; that appellant's expense on appeal should not exceed $1,000.00, and that a supersedeas bond in the sum of $4,000.00 would be adequate.

Upon these motions the Supreme Court of Kansas entered the following order (R. 114):

"Now comes on for decision the motion of the appellees for an order fixing the amount of bond pending an appeal to the United States Supreme Court herein, and also the reply of the appellant to said motion; and thereupon after due consideration by the court it is ordered that the appellant give to the appellees a good and sufficient bond to be approved by this court or one of the justices thereof, in the sum of Eleven Thousand ($11,000.00) Dollars to be filed with the clerk of this court on or before the 29th day of December, 1934,

> conditioned, that the said appellant will pay to the appellee all damages and costs that might accrue to the appellee by reason of the granting of this order."

Within the time limited by the order, petitioner, Mary A. Huffman, as surety, executed bond (R. 17) for the amount which was conditioned as follows:

> "NOW THEREFORE, the conditions of this obligation are such that if the above named principal obligor shall prosecute its said appeal to effect and answer all costs and damages if it shall make good its plea and shall pay all costs and damages that shall be adjudged against them on account of said appeal and/or on account of the said principal obligor failing to remit said final judgment of said The Supreme Court of Kansas, and shall abide the orders of this Court and of the Supreme Court of the United States of America, then this obligation shall be void, otherwise same shall be and remain in full force and effect."

In the present action suit was brought on this bond by the City against petitioner and the Cab Company, the amended petition, so far as material here, simply alleging that the bond had been given, that a certain number of taxicabs had been operated by the Cab Company during the years 1934 and 1935; that certain license fees were thereby due under the provisions of certain city ordinances, and prayed judgment for the amount of such license fees. Such petition failed to allege that any damage had been caused by the restraint and no proof was offered that the restraint had caused the damage. The court of first instance (R. 67, 79) and the Supreme Court of Kansas (R. 134), both held that the bond, by its terms, obligated petitioner, as surety, to pay the amount of license fees fixed by the applicable City ordinances for the number of cabs which it was alleged were operated by the Cab Company, judgment for the amount was rendered against petitioner

and the Cab Company (R. 79) and affirmed on appeal. There was neither allegation nor proof of any prior attempt to collect the license fees from either the taxicab company or the operators, and neither allegation nor proof that the restraint, if any was imposed, had in any way caused or contributed to the failure to collect the license fees from the Cab Company or the operators, or operated in any way to render them uncollectible.

Certain of the license fees for which judgment was rendered by the lower court, and affirmed by the Supreme Court of Kansas, accrued under a city ordinance which was passed subsequent to the time of the giving of the bond (R. 120), and certain other license fees for which judgment was rendered, although provided for by a city ordinance, were not collected by the City from others in like situation with the Cab Company, such others having been permitted to pay under an ordinance subsequently passed which reduced the fees (R. 72).

The matters involved are:

a. Whether a surety is liable at all upon a supersedeas bond given in connection with an appeal to this Court from the final judgment of the highest court of a State where that court has not by its order stayed the enforcement of the judgment;

b. Whether, assuming restraint existed, the liability of a surety on a supersedeas bond given upon appeal from the highest court of a State to this Court, is limited to consequential damages caused by the restraint, which damages must be (1) pleaded and (2) proven.

c. Whether a surety on a supersedeas bond on appeal to this Court from the highest court of a State, is liable for license fees fixed by a city ordinance passed subsequent to the time of the giving of such supersedeas bond.

d. Whether a surety on a supersedeas bond on appeal from the highest court of a State to this Court is liable for taxicab license fees under a city ordinance which was applied against her alone and was not enforced against others in like situation with her principal, such others being permitted to operate cabs upon payment of a lesser license fee.

e. Whether the right of appeal to this Court can be impeded and burdened by the decision of the highest court of a State through the judicial process of reading into a supersedeas bond a condition not written therein and not authorized by Federal law, and enforcing such superadded condition.

The Supreme Court of Kansas in its opinion in this case read into the bond an undertaking on behalf of petitioner to pay these license fees and affirmed the judgment rendered by the trial court for such amounts.

B.

Reasons Relied on for the Allowance of the Writ.

Petitioner asserts:

a. the law is that where no stay order is entered, no restraint is imposed by the giving of a supersedeas bond, and there having been no stay order in this case, there was no restraint and hence no liability;

b. that the law is that the only damages recoverable upon a supersedeas bond given on appeal from the highest court of a State to this Court, are consequential damages and there having been neither pleading nor proof in this cause that the restraint, if any was imposed, caused or contributed to the failure of the City to collect the license fees either from the Cab Company or the operators of the cabs, there is no basis for the entry of the judgment entered in this cause;

c. the law is that a city ordinance must be uniformly applied and that where certain of the license fees which formed the basis for a portion of the judgment in this cause accrued, if at all, under an ordinance which was only sought to be enforced against petitioner as surety in this cause, and was not enforced against others in like situation with the principal obligor on the bond, such portion of the judgment cannot stand;

d. the law is that a superadded condition whereby she is sought to be held for license fees accruing under an ordinance passed after her bond was given, is not within the terms of the bond, is not authorized by Federal law and is void; that certain of the license fees which formed the basis for a portion of the judgment in this cause accrued, if at all, under a City ordinance passed by respondent City subsequent to the giving of the supersedeas bond in this case;

e. that the law is that the right of appeal to this Court cannot be limited and impeded by the courts of a State through the judicial process of adding and enforcing conditions not written into a supersedeas bond and not authorized by Federal Law. That the decision of the court of first instance, affirmed by the Supreme Court of the State of Kansas, by reading into the bond a condition which was not written therein and enforcing such condition, imposes restrictions and limitations upon the right of appeal to this Court, which are not authorized by the applicable Federal statutes fixing and governing the conditions upon which appeals may be had.

On these points the decision of the Supreme Court of Kansas is to the contrary.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court directed to the Supreme Court of Kansas commanding it to certify and send to this Court for its review and determination on a certain date to be therein named, the full and complete transcript of the record and of proceedings in the case in that court numbered and entitled on its docket No. 34,645, The City of Wichita, a Municipal Corporation, Appellee, *v.* The Home Cab Company, et al., (Mary A. Huffman), Appellant, and that the said judgment of the Supreme Court of Kansas may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

MARY A. HUFFMAN,
Petitioner.

By JOHN W. ADAMS,
THOMAS E. ELCOCK,
Her Attorneys.
Both of Wichita, Kansas.

Of Counsel:
H. C. CASTOR,
JOHN BOYER,
Both of Wichita, Kansas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 317

MARY A. HUFFMAN,
Petitioner and Appellant Below,

vs.

THE CITY OF WICHITA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

In the District Court of Sedgwick County, Kansas, the Court of first instance, a jury was waived, that court made findings of fact and conclusions of law (R. 69) which reflect its opinion and the opinion of the Supreme Court of Kansas (R. 134), the highest court of the State, is reported in 151 Kans. 679. This opinion was filed April 6, 1940 (R. 134), within twenty days thereafter petitioner filed her motion for rehearing (R. 146) which was denied by the Supreme Court of Kansas on May 10, 1940 (R. 173) and the decision thereupon became final.

II.

Jurisdiction.

Jurisdiction of this Court is invoked under

(1) Article III of the Constitution of the United States,

(2) The Fourteenth Amendment to the Constitution of the United States,

(3) Paragraph (b) Sec. 344, Title 28 U. S. C. A. (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 52 Stat. 366; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937.)

The applicable Federal Statute which fixes and defines the undertaking in a supersedeas bond on appeal to this Court is 28 U. S. C. A. 869 (R. S. 1000) which reads as follows:

> "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Rule 36 of this Court, so far as material here, reads as follows:

> "In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the req-

uisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat. secs. 1000 and 1007 (28 U. S. C. secs. 869, 874), paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Equity Rule 74, 226 U. S. Appendix p. 22. For stay pending application for review on writ of certiorari see Rule 38, paragraph 6.

"2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good."

This Court has jurisdiction to entertain this appeal (*Martin* v. *Hunter*, 1 Wheat. 304) and the cases relied on by petitioner to sustain the jurisdiction and to warrant the relief prayed are as follows:

Bein et al. v. *Heath*, 12 How. 168;
Hovey v. *McDonald*, 109 U. S. 150;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Knox County v. *Harshman*, 132 U. S. 14;
Tulloek v. *Mulvane*, 184 U. S. 497;
Ah Sin v. *Wittman*, 198 U. S. 500;
Merrimac River Savings Bank v. *City of Clay Center*, 219 U. S. 527;
Woolfolk v. *Jones*, 216 F. 807;
Derrington v. *Conrad*, 7 Kan. Appeals 295;
Cook v. *Smith*, 67 Kans. 53.

III.

Statement of the Case.

The case in its broad outlines is stated under subdivision A of the Petition for Certiorari, which statement will not be here repeated.

The Amended Petition of the case (R. 6) sets forth five causes of action, two of which were abandoned, the case

being submitted and tried on the first cause of action which sought to recover $60.00 per cab for thirty-four taxicabs operated from December 29, 1934 through December 31, 1934; the second cause of action which sought to recover $60.00 per cab for thirty-four taxicabs operated from the 1st day of January, 1935 to and including the 3rd day of January, 1935, and the fourth cause of action which sought to recover $30.00 per cab for twenty-five taxicabs operated from January 4, 1935 to June 14, 1935, which latter date was the date this Court dismissed the appeal in the former case.

The applicable city ordinance (Exhibit K, No. 11-254 effective date December 29, 1932) (R. 119) which was in force from its effective date to January 4, 1935, and provided for a license fee of $60.00 per taxicab per annum, was relied on as fixing the measure of liability under the first and second causes of action. The applicable city ordinances relied on as fixing the measure of liability under the fourth cause of action was Exhibit L, Ordinance No. 11-428, effective date January 4, 1945 (R. 120) which provided for a semi-annual license fee of $30.00 per cab and further provided that when cabs were substituted for previously licensed cabs an additional license tax of only $5.00 should be paid for such substituted cab.

The trial court in its amended findings of fact and conclusions of law (R. 67) found that thirty-four cabs had been operated from December 28, 1934 to December 31, 1934; that thirty-four cabs had been operated from January 1, 1935 to January 3, 1935, and that after January 4, 1935, twenty-five additional cabs were put on under the ordinance providing for semi-annual license fees and these figures formed a basis for the judgment. The trial court further found (Finding of Fact 8-b, R. 72) as follows:

> "For the first six months of the year 1935 the City of Wichita only collected from operators of taxicabs the sum of $30.00 as license fees for the period be-

ginning January 1, 1935, and ending at midnight June 30, 1935. Of the twenty-five taxicabs which were endorsed on the policy of insurance given by The Home Cab Company subsequent to January 3, 1935, twenty of such cabs were replacements in lieu of so many of the thirty-four cabs as were endorsed on the companys policy from January 1, 1935 to January 3, 1935, inclusive, making a total of thirty-nine (39)."

The amended petition was attacked by demurrer (R. 20) on the ground that it did not state facts sufficient to constitute a cause of action in favor of the City and against petitioner. The sufficiency of plaintiff's evidence was challenged by demurrer, the grounds not being specified (R. 41).

The point that there was no stay order and hence no restraint was raised by petitioner's requested Conclusion of Law No. 6 (R. 64); the point that there was no restraint was raised by petitioner's requested Conclusion of Law No. 7 (R. 64); the point that no adequate measure of damage has been proven was raised by petitioner's requested Conclusion of Law No. 8 (R. 64); the discriminatory application of the ordinance was raised by petitioner's motion for amended and supplemental finding No. 4 (R. 75) which the court sustained by making finding No. 8-b, *supra,* and the point that the liability was sought to be enforced under an ordinance passed subsequent to the giving of the bond appeared in finding No. 8, as well as from the ordinance itself. Petitioner moved to set aside this finding in paragraph 3 of her motion to set aside findings of fact, etc. (R. 74).

Petitioner also moved for judgment on the record and special findings (R. 76), such motion being identical as to the first, second and fourth causes of action, "for the reason that the same fail to show liability in favor of the plaintiff and against the defendant, Mary A. Huffman" (R. 76).

That no damages had been proven and that the terms and conditions of the bond were insufficient in fact and law

to entitle the City to recover, were raised by the third, fourth and fourteenth grounds of the motion for a new trial (R. 77).

The notice of appeal (R. 84) covered all the foregoing except the overruling of the demurrer to the amended petition.

The point that there was no proof of damages was raised by a challenge of the record (R. 87).

In addition to the trial errors the specifications of error in the Supreme Court of the State of Kansas (R. 88) raised the want of restraint, the want of proof of damages and the lack of right to recover the damages claimed under the bond.

The Federal character of the questions, the want of restraint, the necessity for pleading and proof of consequential damages, the fact that petitioner was sought to be held to the provisions of an ordinance not passed at the time of giving her bond, and the discriminatory application of the ordinance to her were also raised by the motion for rehearing (R. 147).

The net result of the case from petitioner's standpoint is that by virtue of her execution of the supersedeas bond on December 29, 1934, the liability on which terminated on June 14, 1935, when this Court dismissed the appeal, she is held liable for license fees for thirty-four taxicabs operated during the year 1934, at the rate of $60.00 per cab, for thirty-four taxicabs operated during the first three days of 1935, at the rate of $60.00 per cab, and for twenty-five taxicabs operated subsequent to January 3, 1935, at $30.00 per cab. She was thus held for two years license fees for thirty-four cabs although the trial court found that for the year 1935 the City only collected $30.00 per cab from other taxicab operators for the first six months' period in that year and was further held liable for license fees for twenty-five cabs at the rate of $30.00 per cab under an ordinance

which was passed after she gave her bond, twenty of these cabs being replacements and as such only required to pay a license fee of $5.00 under the very ordinance fixing the $30.00 fee for which appellant was held liable.

IV.

Specifications of Error.

1. The Supreme Court of Kansas erred in finding and holding that any restraint existed.

2. The Supreme Court of Kansas erred in finding and holding that an undertaking to pay the license fees should be read into the bond and that such undertaking when so read into the bond was enforcible.

3. The Supreme Court of Kansas erred in finding and holding that the City was entitled to recover the license fees from petitioner without pleading or proof that the failure to collect the license fees from the cab company was caused by the restraint.

4. The Supreme Court of Kansas erred in finding and holding that petitioner was liable for license fees from January 1, 1935, to January 3, 1935, at the rate of $60.00 per taxicab, for the reason that such ordinance, although general in terms, was only enforced against petitioner and not against others in like situation with the principal obligor on the bond.

5. The Supreme Court of Kansas erred in finding and holding that under a supersedeas bond given on appeal to this Court, license fees could be recovered which were fixed by an ordinance passed subsequent to the giving of the bond. As an alternative assignment, the Supreme Court of Kansas erred in finding and holding that petitioner's liability for twenty substituted cabs was not limited to $5.00 per cab.

V.

Argument.

Petitioner's argument heretofore advanced in the trial court and the Supreme Court of Kansas may be summarized as follows:

VI.

(a) Summary of Argument.

It is respectfully submitted that the decision of the court below is

Point A.

Contrary to and in conflict with the decisions of this Court which hold that in order for restraint to exist there must be a stay order and that restraint does not flow from the mere giving of a supersedeas bond.

Point B.

Contrary to and in conflict with the decisions of this Court which hold that the liability on a supersedeas bond on appeal from the highest court of a State to this Court, in a case such as this, is limited to consequential damages which must be pleaded and proven.

Point C.

Contrary to and conflicting with the decisions of this Court which hold that the liability on a supersedeas bond is limited to consequential damages in that a liability was enforced against petitioner as surety under an ordinance which, although general in its terms, was attempted to be enforced against petitioner alone and not enforced against others in like situation with the principal obligor on the bond.

Point D.

Contrary to and in conflict with the decisions of this Court which hold that the liability on a supersedeas bond is limited to consequential damages in that a portion of the liability and a portion of the license fees which appellant was adjudged to pay, arose under a city ordinance passed subsequent to the giving of the bond and for that reason will not be included in the undertaking of the bond; and, in the alternative, if a liability is to be enforced against petitioner under such subsequently passed ordinance, she is entitled to the benefit of the provisions of the ordinance which provides the license fee of only $5.00 per cab for substituted cabs, of which there were twenty in this case.

VII.

Argument in Support of Point A.

The decision is contrary to and in conflict with the holdings of this Court in *Hovey* v. *McDonald et al., supra, Knox County* v. *Harshman, supra,* and *Merrimack River Savings Bank* v. *City of Clay Center, supra,* where it was held that when a stay is not granted, the decree of the lower court retains its intrinsic force and effect notwithstanding that a supersedeas bond may be given. It is not believed necessary to amplify this point further, for, insofar as counsel are aware, the point is not doubtful.

The Supreme Court of Kansas apparently concedes that it issued no stay order and the opinion would seem to hold that the bond executed by appellant in and of itself had the effect of continuing a temporary injunction order issued by the court of first instance.

On page 685 of its opinion, the Supreme Court of Kansas says:

> "Appellant insists the bond it posted in this court did not revive the original injunction order. The bond

it posted in order to perfect its appeal from the decision of this court continued the effect of the injunction."

As will be observed, no case was cited and so far as counsel are aware, no case will be found supporting this view. The question is not one of State law and it is within the exclusive power of Congress, and of this Court, to fix, regulate and determine the conditions for the exercise of the appellate jurisdiction of this Court. It is not competent for the Supreme Court of Kansas to say that the giving of a supersedeas bond on appeal to this Court has the effect of continuing in force an injunction order issued by an inferior State Court. Neither Congress nor this Court have ever attached such consequences to the giving of a supersedeas bond. The question is one of Federal law. *Tullock* v. *Mulvane, supra.*

Argument in Support of Point B.

The decision is contrary to and conflicting with the decision of this Court in the case of *Omaha Hotel Company* v. *Kountze, supra,* holding that superadded conditions incorporated into the provisions of a supersedeas bond are not enforcible.

In this case, the Supreme Court of Kansas by judicial interpretation, superadded a condition to the bond. It undertook to do this by the process of declaring that the condition in the bond to the effect that the principal and surety would "answer all costs and damages if it shall (not) make good its plea", was an undertaking to pay the license fees.

That court said in its opinion:

> "What damages did the parties intend the bond should cover? We think any doubt on that subject which may result from a construction or interpretation

> of the letter of the bond is completely resolved by the facts and circumstances surrounding its execution. Those facts and circumstances have been narrated. They compel the conclusion a bond in the sum of $11,000 was required by this court for the express purpose of protecting the city in the collection of license fees, in the event the cab company should not make good its plea."

It is difficult for petitioner to follow this reasoning. She is unable to determine whether the court regarded the intent of the parties as controlling, or the intent of the Supreme Court of Kansas as controlling. In either event, it is submitted that the decision is wrong for it is for Congress and this Court, and not the parties or the State Court, to determine what undertaking shall be sufficient to bring a case to this Court for review. The right of appeal to this Court cannot be made to depend upon the will of the parties or the intention of the State court.

Under the *Omaha Hotel Company* case, the condition that the Supreme Court wrote into the bond by interpretation would not have been enforceable even if it has in terms been incorporated into the bond, much less can it be enforced if it was not in the bond.

Under its professed views, the Supreme Court of Kansas, of course, found no reason to consider the necessity of pleading and proof of consequential damages. This is necessary, as the cases show. An illustrative case from the lower Federal courts is *Woolfolk* v. *Jones, supra.* Prior to the decision in this case, the rule of the *Omaha Hotel Company* case was also the law in Kansas. *Cook* v. *Smith, supra, Derrington* v. *Conrad, supra, Cook* v. *Smith* was strikingly similar on its facts to this case, the court holding that lack of an averment that the damage was caused by the delay rendered a petition for recovery on the bond demurrable. Although cited and discussed in the brief,

these Kansas cases were ignored by the Supreme Court of Kansas. Be that as it may; the question is not one of local law but Federal law and the rule of *Omaha Hotel Co.* v. *Kontze* is believed controlling.

Argument in Support of Point C.

In *Yick Wo* v. *Hopkins, supra,* and *Ah Sin* v. *Wittman, supra,* the rule is announced and applied to the effect that an ordinance, although valid on its face may not be enforced in a discriminating manner. In this case it was expressly found by the trial court (Finding 8-b, R. 72) that other taxicab operators in like situation were permitted to pay only a $30.00 license fee per cab for the first six months of 1935, while judgment in this case on the second cause of action was rendered against petitioner for a $60.00 license fee per cab on account of operation of cabs for three days. Such judgment was not only unwarranted by principles of consequential damages, but also was in violation of petitioner's rights under the 14th Amendment.

Argument in Support of Point D.

In the original restraining order issued by the trial Court, the City was restrained "from enforcing any of the provisions of Ordinance No. 11-180 *or the amendments thereto*" (R. 49). There was other similar language in the order. Both the trial Court and the Supreme Court of Kansas appear to have held that this language applied to amendments subsequently enacted. The Supreme Court of Kansas in its opinion says:

> "It is finally urged the judgment is erroneous as to the amount of damages recoverable under the respective causes of action. The findings of fact, upon which the conclusions of law were based, are supported by substantial evidence. This is true as to the ordi-

nances *and the amendments thereof,* (Italics ours) which the city was enjoined from enforcing."

That the order only related to amendments already enacted, of which there were several, appears obvious.

However, even though this Court should permit the Supreme Court of Kansas to err in its interpretation of this order the point still remains that the condition was an unreasonable one and not authorized by Federal law.

The courts had no way to control the City's action in advance and such action could not be anticipated. To say that in order to seek redress in this Court one must insure payment of license fees that may thereafter be imposed at the whim of a municipal body is to interpose an unsurmountable barrier to the right of appeal to this Court.

VII.

Conclusion.

Aside from its importance to petitioner, this case is believed to present questions of public importance. For if a State court by its decision may attack prohibitive conditions to appeals to this Court, as was done in this case, the right of appeal will be an empty one.

WHEREFORE, it is respectfully submitted that your petitioner's prayer for the issuance of a writ of certiorari be granted.

JOHN W. ADAMS,
THOMAS E. ELCOCK,
Of Wichita, Kansas,
Counsel for Petitioner.

H. C. CASTOR,
JOHN BOYER,
Both of Wichita, Kansas.
Of Counsel for Petitioner.

(9296)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 317

MARY A. HUFFMAN,

Petitioner,

vs.

THE CITY OF WICHITA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BENJ. F. HEDGES,
VINCENT F. HIL[illegible],
K. W. PRINGLE,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

Comes now the respondent in the above entitled case and opposes the granting of a writ of certiorari to the Supreme Court of the State of Kansas for the following reasons, to-wit:

I. That petitioner failed to raise any federal question in the trial of this action in the District Court of Sedgwick County, Kansas or in the appeal and hearing before the Supreme Court of the State of Kansas.

II. That the first time any attempt was made to raise a federal question, to-wit: that the decision invaded the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States was when the petitioner filed a petition for rehearing in the Supreme Court of the State of Kansas.

AUTHORITIES IN SUPPORT OF RESPONDENT'S CONTENTION.

I.

FAILURE OF THE PETITIONER TO RAISE ANY FEDERAL QUESTION IN THE TRIAL OF THIS ACTION IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS OR IN THE APPEAL AND HEARING BEFORE THE SUPREME COURT OF THE STATE OF KANSAS BARS HER RIGHT TO A WRIT OF CERTIORARI.

Hulbert v. City of Chicago, 202 U. S. 275, 279.
Burt v. Smith, 203 U. S. 129, 135.
Mallers v. Commercial Loan & Trust Co., 216 U. S. 613.
Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248.
American Surety Co. v. Baldwin, 287 U. S. 156.

II.

THE ATTEMPT TO RAISE A FEDERAL QUESTION FOR THE FIRST TIME IN A PETITION FOR REHEARING IN THE SUPREME COURT OF THE STATE OF KANSAS COMES TOO LATE TO ENTITLE THE PETITIONER TO A WRIT.

American Surety Co. v. Baldwin, 287 U. S. 156.
Live Oak Water Users' Assoc. v. Railroad Commission, 269 U. S. 354.

Rooker v. Fidelity Trust Co., 261 U. S. 114.
Godchaux Company, Inc. v. Estopinal, 251 U. S. 179.
St. Louis & San Francisco Railroad Co. v. Shepherd, 240 U. S. 240.

ARGUMENT.

In addition to the foregoing authorities, counsel for the respondent desire to point out various parts of the transcript of the record to show to this Court that under said decisions the petitioner is not entitled to a writ of certiorari.

The answer to the amended petition filed by the petitioner, then defendant, in the District Court of Sedgwick County, Kansas, is set forth at pages 21 to 23 of the transcript of the record. In said answer it will be noted that no claim was made that the rights of the petitioner under the Constitution might be invaded and that no federal question was raised.

At the close of the introduction of evidence in the lower court by the plaintiff, the defendant therein, petitioner here, demurred to the evidence (R. 41-46) and again raised no federal question.

At the close of the introduction of evidence in the lower court, the defendant therein, petitioner here, filed a motion for judgment on the record and for special findings (R. 76) and again failed to raise any federal question.

After the decision in the lower court, the defendant therein, petitioner here, filed a motion for a new trial (R. 77-79), and raised no federal question therein.

Upon appeal to the Supreme Court of the State of Kansas, the defendant therein and petitioner here made specifications of error (R. 88-89), and again failed to raise any federal question or make any claim that the rights guaranteed to said defendant under the Constitution had been invaded by said judgment.

The opinion of the Supreme Court of Kansas upon the issues involved (R. 134-146) shows that neither was there any federal question raised in said hearing nor was any consideration given by said court to any contention that the rights of the appellant and petitioner here as guaranteed by the Constitution of the United States were invaded.

The first time any attempt was made to raise the question as to whether or not the petitioner's rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States, or section 1 of the Bill of Rights and Constitution of Kansas, or section 3 of Article II of the Constitution of Kansas were invaded, was at the conclusion of the petition for rehearing (R. 171-172), wherein the petitioner, appellant therein, stated as follows:

> "It (the opinion) not only does violence to reason, but the result would constitute invasion of appellant's rights under the 14th Amendment to the Constitution of the United States, Section 1 of the Bill of Rights of the Constitution of Kansas, and perhaps Section 3 of Article 2 of the Constitution of the State of Kansas."

Counsel for the respondent respectfully submit:

1. That no federal question is involved giving this court jurisdiction as shown by the petition for the writ filed by the petitioner herein.

2. That no federal question was raised by the petitioner in the proceedings in the state court until after the opinion and decision of the Supreme Court of Kansas.

3. That the attempt to raise a federal question in the petition for rehearing filed in the Supreme Court of Kansas after the decision was not seasonably made and does not give this court jurisdiction to proceed further or to issue a writ of certiorari to the Supreme Court of the State of Kansas.

Respectfully submitted,

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